

Jun 11, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JOLENE W.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 2:18-CV-00165-JTR

ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment. ECF Nos. 14, 15. Attorney Dana C. Madsen represents Jolene W. (Plaintiff); Special Assistant United States Attorney Heather L. Griffith represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **DENIES** Plaintiff's Motion for Summary Judgment and **GRANTS** Defendant's Motion for Summary Judgment.

**JURISDICTION**

Plaintiff filed an application for Disability Insurance Benefits (DIB) on November 7, 2014, Tr. 120, and an application for Supplemental Security Income (SSI) on December 29, 2015, Tr. 179. She alleged her disability began on August 1, 2013, Tr. 224, 240, due to bipolar disorder, personality disorder, posttraumatic stress disorder (PTSD), and cyclic vomiting syndrome, Tr. 266. The DIB

1 application was denied initially and upon reconsideration. Tr. 151-53, 158-59.  
2 The SSI application was consolidated with the DIB application at the hearing level.  
3 Tr. 179. Administrative Law Judge (ALJ) Marie Palachuk held a hearing on  
4 November 16, 2016 and heard testimony from Plaintiff, medical expert Minh Vu,  
5 M.D., psychological expert Marian Martin, Ph.D., and vocational expert Sharon  
6 Walter. Tr. 40-73. The ALJ issued an unfavorable decision on January 13, 2017.  
7 Tr. 19-33. The Appeals Council denied review on March 26, 2018. Tr. 1-5. The  
8 ALJ's January 13, 2017 decision became the final decision of the Commissioner,  
9 which is appealable to the district court pursuant to 42 U.S.C. §§ 405(g), 1383(c).  
10 Plaintiff filed this action for judicial review on May 21, 2018. ECF Nos. 1, 4.

### 11 **STATEMENT OF FACTS**

12 The facts of the case are set forth in the administrative hearing transcript, the  
13 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
14 here.

15 Plaintiff was 37 years old at the alleged date of onset. Tr. 224. She  
16 completed her GED in 2009. Tr. 267. Her reported work history includes the jobs  
17 of caregiver, fast food worker, housekeeper, appointment setter, and telemarketer.  
18 Tr. 267, 282-87. When applying for benefits Plaintiff reported that she stopped  
19 working on August 13, 2013 because of her conditions. Tr. 266.

### 20 **STANDARD OF REVIEW**

21 The ALJ is responsible for determining credibility, resolving conflicts in  
22 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
23 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,  
24 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
25 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is  
26 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
27 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
28 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put

1 another way, substantial evidence is such relevant evidence as a reasonable mind  
2 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402  
3 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational  
4 interpretation, the court may not substitute its judgment for that of the ALJ.  
5 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative  
6 findings, or if conflicting evidence supports a finding of either disability or non-  
7 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d  
8 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial  
9 evidence will be set aside if the proper legal standards were not applied in  
10 weighing the evidence and making the decision. *Browner v. Secretary of Health*  
11 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

## 12 **SEQUENTIAL EVALUATION PROCESS**

13 The Commissioner has established a five-step sequential evaluation process  
14 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),  
15 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one  
16 through four, the burden of proof rests upon the claimant to establish a prima facie  
17 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This  
18 burden is met once the claimant establishes that physical or mental impairments  
19 prevent her from engaging in her previous occupations. 20 C.F.R. §§ 404.1520(a),  
20 416.920(a)(4). If the claimant cannot do her past relevant work, the ALJ proceeds  
21 to step five, and the burden shifts to the Commissioner to show that (1) the  
22 claimant can make an adjustment to other work, and (2) the claimant can perform  
23 specific jobs which exist in the national economy. *Batson v. Comm'r of Soc. Sec.*  
24 *Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant cannot make an  
25 adjustment to other work in the national economy, she is found "disabled". 20  
26 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

## 27 **ADMINISTRATIVE DECISION**

28 On January 13, 2017, the ALJ issued a decision finding Plaintiff was not

1 disabled as defined in the Social Security Act from August 1, 2013 through the  
2 date of the decision.

3 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
4 activity since August 1, 2013, the alleged date of onset. Tr. 21.

5 At step two, the ALJ determined that Plaintiff had the following severe  
6 impairments: cyclic vomiting syndrome; right shoulder tendinopathy; migraines;  
7 bipolar disorder; PTSD; and personality disorder, not otherwise specified. Tr. 21.

8 At step three, the ALJ found that Plaintiff did not have an impairment or  
9 combination of impairments that met or medically equaled the severity of one of  
10 the listed impairments. Tr. 24.

11 At step four, the ALJ assessed Plaintiff's residual function capacity and  
12 determined she could perform a range of medium work with the following  
13 limitations:

14 [S]he is limited to no climbing of ladders, ropes or scaffolds; frequent  
15 overhead reaching with the bilateral upper extremities; avoid  
16 concentrated exposure to extreme temperatures, respiratory irritants  
17 and hazards; no more than moderate exposure to industrial noise and  
18 industrial vibrations (both to avoid migraine triggers); able to  
19 understand, remember and carryout simple, routine and repetitive tasks  
20 and instructions; able to maintain attention and concentration on  
21 simple, routine tasks for two-hour intervals between regularly  
22 scheduled breaks; no more than minimal changes in the work routine;  
23 no judgment or decision making; no fast paced production rate (defined  
as assembly line type work); no interaction with the public; no more  
than occasional small groups of three to four workers or independent  
work setting; should deal with things rather than people.

24 Tr. 26. The ALJ identified Plaintiff's past relevant work as cashier II, telephone  
25 solicitor, cleaner housekeeping, fast food worker, sales representative (door to  
26 door), and fund raiser II and found that she could perform the past relevant work of  
27 cleaner housekeeping as it is generally performed in the national economy. Tr. 31.

28 As an alternative to denying the claim at step four, the ALJ made a step five

determination that, considering Plaintiff's age, education, work experience and residual functional capacity, and based on the testimony of the vocational expert, there were other jobs that exist in significant numbers in the national economy Plaintiff could perform, including the job of cleaner housekeeping. Tr. 31-32. The ALJ concluded Plaintiff was not under a disability within the meaning of the Social Security Act from August 1, 2013, through the date of the ALJ's decision. Tr. 32.

## ISSUES

The question presented is whether substantial evidence supports the ALJ's decision denying benefits and, if so, whether that decision is based on proper legal standards. Plaintiff contends the ALJ erred by failing to properly weigh Plaintiff's symptom statements and failing to properly weigh the medical opinions in the record. ECF No. 14. Additionally, Plaintiff argues that these errors were not harmless and the proper remedy is to remand the matter for an immediate award of benefits. *Id.*

## DISCUSSION<sup>1</sup>

### 1. Plaintiff's Symptom Statements

Plaintiff argues that the ALJ improperly discredited her symptom claims. ECF No. 14 at 18.

It is generally the province of the ALJ to make determinations regarding the reliability of Plaintiff's symptom statements, *Andrews*, 53 F.3d at 1039, but the

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<sup>1</sup>In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held that ALJs of the Securities and Exchange Commission are "Officers of the United States" and thus subject to the Appointments Clause. To the extent *Lucia* applies to Social Security ALJs, the parties have forfeited the issue by failing to raise it in their briefing. See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not specifically addressed in an appellant's opening brief).

1 ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,  
2 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,  
3 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear  
4 and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v.*  
5 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient:  
6 rather the ALJ must identify what testimony is not credible and what evidence  
7 undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

8 The ALJ found Plaintiff's statements concerning the intensity, persistence,  
9 and limiting effects of her symptoms to be "not entirely consistent with the medical  
10 evidence and other evidence in the record." Tr. 27. Specifically, the ALJ found  
11 that Plaintiff's statements were not supported by the medical evidence and that  
12 Plaintiff made inconsistent statements regarding her symptoms. Tr. 28-29.

13 Plaintiff's argument in her Motion for Summary Judgment contains a  
14 single paragraph asserting that there are no clear and convincing reasons to  
15 disregard her reported symptoms and limitations. ECF No. 14 at 18. She fails to  
16 identify and challenge the ALJ's reasons for rejecting her statements. *Id.* In  
17 response, Defendant argues that this challenge is insufficient and amounts to  
18 Plaintiff waiving the issue. ECF No. 15 at 4-5. In the alternative, Defendant  
19 identifies the ALJ's reasons for rejecting Plaintiff's symptom statements as (1)  
20 they were not supported by the objective medical evidence, (2) Plaintiff's mental  
21 health was stable with medications, (3) no acceptable medical source had ever  
22 reported disabling limitations due to Plaintiff's physical impairments, and (4)  
23 Plaintiff provided inconsistent accounts of her symptoms.<sup>2</sup> ECF No. 15 at 6-10.  
24 As a Reply, Plaintiff asserts she has not waived any arguments because she

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25  
26 <sup>2</sup>The Court read the first three reasons as all falling under the umbrella of the  
27 ALJ's finding that Plaintiff's symptom statements were not supported by the  
28 medical evidence.

1 sufficiently outlined the evidence that supports her reported symptoms in the  
2 Statement of Facts in the Motion for Summary Judgment. ECF No. 16 at 1-2. She  
3 then identified and challenged the ALJ's reasons for rejecting her symptom  
4 statements as (1) because they were inconsistent with her reported activities of  
5 working on a computer, managing her money, and partaking in hobbies and (2)  
6 because Plaintiff made statements to her mental health providers showing  
7 improvement in her symptoms. *Id.* at 2-4.

8 Plaintiff's briefing fails to adequately address the issue of the ALJ's  
9 treatment of her symptom statements in two ways. First, a summary of the medical  
10 evidence followed by a single paragraph asserting that there are no clear and  
11 convincing reasons to disregard her symptom statements is insufficient to establish  
12 any error on the part of the ALJ or to demonstrate how the ALJ's decision was not  
13 supported by substantial evidence. *See Carmickle*, 533 F.3d at 1161 n.2. The  
14 Ninth Circuit explained the necessity for providing specific argument :

15       The art of advocacy is not one of mystery. Our adversarial system  
16 relies on the advocates to inform the discussion and raise the issues  
17 to the court. Particularly on appeal, we have held firm against  
18 considering arguments that are not briefed. But the term "brief" in  
19 the appellate context does not mean opaque nor is it an exercise in  
20 issue spotting. However much we may importune lawyers to be  
21 brief and to get to the point, we have never suggested that they skip  
22 the substance of their argument in order to do so. It is no accident  
23 that the Federal Rules of Appellate Procedure require the opening  
24 brief to contain the "appellant's contentions and the reasons for  
25 them, with citations to the authorities and parts of the record on  
26 which the appellant relies." Fed. R. App. P. 28(a)(9)(A). We  
27 require contentions to be accompanied by reasons.

28 *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003).<sup>3</sup>

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<sup>3</sup>Under the current version of the Federal Rules of Appellate Procedure, the appropriate citation would be to FED. R. APP. P. 28(a)(8)(A)

Moreover, the Ninth Circuit has repeatedly admonished that the court will not “manufacture arguments for an appellant” and therefore will not consider claims that were not actually argued in appellant’s opening brief. *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994). Because Plaintiff failed to provide adequate briefing, she waived the argument.

Second, even if Plaintiff’s Reply briefing could be considered a properly raised challenge to the ALJ’s reasons for rejecting her symptom statements, Plaintiff failed to challenge all the reasons the ALJ provided. Plaintiff’s first challenge was to the issue of whether her activities were inconsistent with her reported symptoms, which was not a reason the ALJ provided for rejecting her symptom statements. ECF No. 16 at 2-3. Her second challenge was to the issue of her reported symptoms not being consistent with the medical evidence, asserting that the ALJ was cherry picking evidence. ECF No. 16 at 3. She made no challenge to the ALJ’s conclusion that her physical complaints were not supported by the medical evidence. Therefore, even if her challenges were to prevail, the ALJ still provided unchallenged reasons and any error would be harmless. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (An error is harmless when “it is clear from the record that the . . . error was inconsequential to the ultimate nondisability determination.”); *Carmickle*, 533 F.3d at 1163 (upholding adverse credibility finding where ALJ provided four reasons to discredit claimant, two of which were invalid).

## **2. Medical Opinions**

Plaintiff argues the ALJ failed to properly consider and weigh the medical opinion expressed by John B. Severinghaus, Ph.D. ECF No. 14 at 19.

In weighing medical source opinions, the ALJ should distinguish between three different types of physicians: (1) treating physicians, who actually treat the claimant; (2) examining physicians, who examine but do not treat the claimant; and, (3) nonexamining physicians who neither treat nor examine the claimant.



1 *Lester*, 81 F.3d at 830. The ALJ should give more weight to the opinion of a  
2 treating physician than to the opinion of an examining physician. *Orn v. Astrue*,  
3 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ should give more weight to  
4 the opinion of an examining physician than to the opinion of a nonexamining  
5 physician. *Id.*

6 When an examining physician's opinion is not contradicted by another  
7 physician, the ALJ may reject the opinion for "clear and convincing" reasons, and  
8 when an examining physician's opinion is contradicted by another physician, the  
9 ALJ is only required to provide "specific and legitimate reasons" to reject the  
10 opinion. *Lester*, 81 F.3d at 830-31. The specific and legitimate standard can be  
11 met by the ALJ setting out a detailed and thorough summary of the facts and  
12 conflicting clinical evidence, stating her interpretation thereof, and making  
13 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is  
14 required to do more than offer her conclusions, she "must set forth [her]  
15 interpretations and explain why they, rather than the doctors', are correct."  
16 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

17 On January 12, 2015, Dr. Severinghaus completed a Psychological  
18 Evaluation at the request of the Washington Office of Disability Determination  
19 Services. Tr. 565-69. He provided the following medical source statement:

20 Memory and cognitive problem-solving appear intact overall. Some  
21 errors and glitches may occur in relation to her mood swings.  
22 Interpersonal functioning is severely reduced overall because of her  
23 breakthrough emotions, particularly anger. While she is a nice person,  
24 clearly, her bipolar anger has not been fully controllable and she's had  
25 anger episodes since childhood, even on medication. The anger  
26 episodes, plus her crying spells, also not fully controllable, have greatly  
27 interfered with her attempts to maintain employment. Pace and  
28 persistence appear reduced partly because of medical issues, but  
verification of this is needed from a medical point of view. From a  
psychological standpoint, pace and persistence are also moderately to  
severely reduced because of her breakthrough mood swings, as

described. She is able to manage funds, despite her concerns. As long as she remains clean and sober, with her current level of appropriate use of marijuana, she won't need a payee.

Tr. 569. The ALJ gave Dr. Severinghaus' opinion "some weight," but limited this weight "because his medical source statement is not a function by function assessment, but rather uses vague, general terms such as 'moderately severe.'" Tr. 30. The ALJ also limited the weight provided to the opinion because it appeared "to be based solely on subjective complaints and are unsupported by objective mental status abnormalities," and provided examples of how the medical source statement was inconsistent with the mental status examination performed during the evaluation. *Id.*

Plaintiff's challenge to the ALJ's treatment of Dr. Severinghaus' opinion asserts that it was consistent with the findings of her counselors at Frontier Behavioral Health and consistent with the opinion of her treating practitioner, Dawn Ann Mattison, ARNP. ECF No. 14 at 19-20. Plaintiff did not refute or even address the reasons the ALJ provided for providing less weight to Dr. Severinghaus' opinion. Defendant argues that by failing to address the reasons the ALJ provided for giving less weight to the opinion, Plaintiff has waived her argument. ECF No. 15 at 4-5. In her Reply, Plaintiff addresses the ALJ's finding that the opinion was based solely on Plaintiff's subjective complaints, ECF No. 16 at 4-7, but failed to challenge the ALJ's other two reasons: (1) Dr. Severinghaus medical source statement was not a function by function assessment, but rather used vague, general terms and (2) it was unsupported by objective mental status abnormalities. Tr. 30.

Here, Plaintiff's briefing fails for two reasons. First, because Plaintiff failed to "specifically and distinctly" present an argument regarding the ALJ's reasons for not crediting Dr. Severinghaus' opinion in her opening brief, any argument was waived. *Greenwood*, 28 F.3d at 977; *see also Independent Towers of Wash.*, 350

1 F.3d at 929. Second, even if Plaintiff's Reply briefing could be considered as a  
2 properly raised challenge to the ALJ's reasons, she only challenged one out of the  
3 three reasons the ALJ provided for giving the opinion less weight. Even if the  
4 argument prevailed, the ALJ still provided two additional and unchallenged  
5 reasons. Therefore, any resulting error would be considered harmless. *See*  
6 *Tommasetti*, 533 F.3d at 1038 (An error is harmless when "it is clear from the  
7 record that the . . . error was inconsequential to the ultimate nondisability  
8 determination.").

### 9 CONCLUSION

10 Accordingly, **IT IS ORDERED:**

11 1. Defendant's Motion for Summary Judgment, **ECF No. 15**, is  
12 **GRANTED.**

13 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED.**

14 The District Court Executive is directed to file this Order and provide a copy  
15 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**  
16 **and the file shall be CLOSED.**

17 DATED June 11, 2019.

A handwritten signature in black ink, appearing to read "M", is positioned above the printed name of the judge.

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE